

[REDACTED]

January 27, 1989

[REDACTED]

via Federal Express

Richard Smith, Esq.
Pre Merger Notification Office
Federal Trade Commission - Room 801
Washington, D.C. 20580

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FEDERAL TRADE COMMISSION
This material may be subject to
the confidentiality provision of
Section 7A (b) of the Clayton Act
which restricts release under the
Freedom of Information Act
Our File [REDACTED]

Dear Mr. Smith:

This letter is intended to confirm the telephone conversation which [REDACTED] and I had with your today. Our conversation focused upon the question of what constitutes a company's "last regularly prepared annual statement of income and expense" within the meaning of Commission regulation 801.11(c)(1) under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("the Act").

I referred to the September 17, 1981 letter to the Pre Merger Notification Office which is summarized as letter No. 90 in the ABA Pre Merger Notification Practice Manual. I explained that my client is a company about to be sold. It regularly produces audited annual financial statements. The last such financial statements were released in March 1988 and reported net sales and assets below the levels for reporting filing under the Act. The company's audited statements for the year just entered are not expected to be available in the ordinary course of business until about mid-March 1989. We recognize, of course, that if such audited statement is available before the event of a sale a filing would be required prior to any sale if the statement shows that the company's assets or sales have increased to reporting levels.

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You confirmed that the Commission's staff has as recently as December 1988 met and discussed ABA letter 90 and remains of the view that letter is correct and still expresses the view of the Commission's staff.

I explained that as a part of the process which leads to the final audited statements the company in the ordinary course of business prepares drafts of the annual statement of income and expense. The drafts may be made available to company management and or directors, as drafts, but they are submitted to and are reviewed and revised or commented upon by the auditors prior to their finalization as the annual financial statements of the company. That review by the auditors can lead to changes in the company's annual net sales as shown in the final audited statement of income and expense. I explained that the company has operated in this way in the past. I asked if, in these circumstances, the staff concurred that, assuming there has been no attempt to delay the audit for purposes of avoiding filing, the draft annual statement of income and expense do not constitute the "last regularly prepared annual statement of income and expense," and that only the final audited statement of income and expense is the document referred to in the regulation. You stated your understanding that in those circumstances in accordance with the company's practice in prior years, it was only the last document, the audited statement, which would constitute the "regularly prepared annual statement of income and expense" and that the draft statements would not be such a "last regularly prepared annual statement of income and expense." You stated, however, that a regularly prepared interim balance sheet (such as quarterly statements) would constitute a "regularly prepared balance sheet" within 801.11(c)(2), even if not audited.

I am writing this letter to confirm our conversation and ask that you promptly advise me if the staff disagrees with anything herein.

I thank you for your advice and cooperation.

Cordially,

cc: [REDACTED]

1-2-89 called
[REDACTED] and
stated [REDACTED] office
agrees with the
Commission's
letter